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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 23

NEROY CARTER,
Petitioner and Appellant Below,

vs.

ATLANTA AND SAINT ANDREWS BAY RAILWAY COMPANY, A BODY CORPORATE,
Respondent and Appellee Below

APPENDIX "A" TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 565

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FOREWORD

The following depositions having been omitted from the printed record and being here only as original exhibits, are for the convenience of the Court, printed as Appendix "A" to Brief of Petitioner. As so printed the depositions have been duly correlated with the several rulings of the Trial Court and the colloquies of counsel in respect to said depositions.

DEPOSITION OF DR. WILLIAM G. THUSS

Witness for the Plaintiff

DIRECT EXAMINATION

Q. (BY MR. JACKSON): Will you please state your name and place of residence?

A. W. G. Thuss, Birmingham, Alabama.

Q. In what profession are you engaged?

A. Industrial surgeon.

Q. Are you a graduate of any medical college, and if so, what college, and what year did you graduate, and what degree did you get?

A. I graduated at Vanderbilt University, Nashville, Tennessee, in 1920; degree of M.D.

Q. Have you ever served in any hospital or infirmary as an intern or house surgeon or been connected with the staff of any such institution?

A. Yes.

Q. When and where did that service occur, Doctor?

A. I was intern at St. Thomas Hospital in Nashville in 1917 to 1920; that was before I finished school. I was resident surgeon at St. Luke Hospital in New York City in 1920 to 1922.

Q. How long have you been practicing medicine in Birmingham, Alabama?

A. Since 1923.

Q. You are a member of the—you are an accredited medical man of Alabama at this time?

A. Yes, sir.

Q. I will ask you to state whether or not you specialize in any particular branch of medicine, and if so, what branch?

A. Yes. I specialize in industrial traumatic surgery and its related subjects.

Q. Do you know Neroy Carter, the plaintiff in this case?

A. I know him by virtue of having examined him.

Q. You have examined him then, you say?

A. Yes.

Q. Do you recollect about when you made that examination, Doctor?

A. About the middle of March, 1946.

Q. I wish you would state for the record briefly of what the examination consisted, and the findings that you made from that examination, the conclusions that you reached.

A. After an interview, history, the man was observed as to the way he walked, mentality; he was stripped and complete physical examination insofar as his complaints was carried out; his compiaints were directed to his back lumbar areas and his left hip; and, to a less degree, encircling each groin toward the front. The examination was a visual and a physical and an objective examination. The visual evidence of abnormalities was considered; the physical findings, such as muscular stiffness, spasm, limitation of motion, and his complaints of pain, whether they were localized, at what point they were localized, and to what

points they extended, his reflexes and his muscle development.

Q. From the examination of these various matters, both objective and subjective, did you arrive at any conclusion as to whether or not there was anything wrong with him?

A. Yes.

Q. What was your conclusion, Doctor?

A. I came to the conclusion that he had something wrong with his back; that he had some condition in his back that was responsible for his stiffness and his pain, his limitation of motion, his reflected pain.

Q. Did you have some x-rays made of this man?

A. Yes, sir.

Q. Have you got those x-rays?

A. Yes, sir.

Q. I wonder if you would produce them?

A. Yes.

Q. I will ask you to state whether or not the conclusion that you reached from the objective and subjective symptoms that you have just described, did that find any confirmation in the x-rays?

A. Yes, sir.

Q. I will ask you to take one of the x-rays that you say confirmed your clinical findings and look at it.

A. This x-ray here (indicating) shows more than the other x-rays, because it is the part of the back that has an exaggerated curvature, and shows a slipping forward of the last lumbar vertebra on the sacral segment.

MR. JACKSON: Now, I want to offer that.

THE WITNESS: This is what we call a spot-x-ray; it was taken of this particular area rather than one of these large films, which are more generalized; that is a localized picture, film.

MR. JACKSON: I want to offer that x-ray in evidence, and give it to the Commissioner to be marked as Exhibit 1 to the testimony of Dr. Thuss.

Q. Doctor, what is spondylolisthesis?

A. Spondylolisthesis is a slipping forward of the fifth lumbar vertebra on the sacral segment, with the impingement or the pressure or a partial collapse of the tissue between the vertebrae, which is referred to as the disc, or is referred to as the inter-vertebral tissue between the discs.

Q. Is that the condition you have just described in other language?

A. Well, he has a slipping forward of the fifth lumbar vertebra and an exaggerated curve, and I think it could be classified as a spondylolisthesis.

Q. That, in other language, as I understand it, involves a displacement of one of the vertebra on the column?

A. That is right.

Q. Now, Doctor, as I understand it, the vertebrae in a man's back house the spinal cord? That is correct, isn't it?

A. Yes, sir.

Q. There is a canal that traverses a man's back bone through his spinal column down which the spinal cord goes? That is correct, isn't it?

A. Yes, sir.

Q. Now, would the slipping forward, the spondylolisthesis that you have described, could that have the effect of impinging on the spinal cord or any of the nerves which come out of it between the two vertebrae that you are talking about?

A. That associated with the other abnormality could cause nerve pressure either against the cord or against the spinal roots or the nerves coming off of the cord. The reason that I put "the other abnormality" is that, as a rule, you don't find the spondylolisthesis without some other abnormality; it isn't usually just single.

Q. I don't exactly understand what you mean by that. Will you explain that a little further?

A. What I mean is that you don't find spondylolisthesis existing as a single entity; it is usually accompanied by a

partial collapse or something involving the intervertebral tissue there.

Q. Now, were they any objective symptoms, aside from the x-rays, that you discovered in your examination of this man which would bear out the conclusion that there had been a nerve injury or impairment?

A. The objective evidence which would indicate some nerve involvement would be the fact that the man kept his back stiff, rigid, that you could see the spasm of the muscles; that was the only objective evidence of nerve injury; the other was subjective symptoms which you were able to detect.

Q. Did you ascertain any points of tenderness in his back?

A. Yes.

Q. Were they at a spot which would corroborate your diagnosis that you have made?

A. Yes. The points of tenderness were along the path of the left sciatic nerve.

Q. The left sciatic nerve?

A. Yes, sir.

Q. Did you observe any rigidity or tendency to stand stiffly in his back?

A. Yes, sir.

Q. Was there any limitation of motion or flexibility in his posture?

A. Yes, sir.

Q. Now, as to the subjective symptoms, Doctor, what were they?

A. The subjective symptoms were his complaint of pain and tenderness on pressure along the nerve, along the sciatic nerve on the left side, his complaint of weakness in the back, his complaint of limitation of motion, his complaint that he tired easily after he was up for any period of time.

Q. I believe you have testified that, in your professional opinion, there was present an intervertebral disc syndrome?

A. In my opinion, the symptoms that this man had, with his physical findings, suggested that possibility. It would warrant, of course, further investigation.

Q. When you say "further investigation", what do you mean by that?

A. Here we have a man that gives a history of having injured his back; he hasn't got well, he still complains. He obviously has pain; his pain is referred along the path of one of the larger nerves going down the leg, which leads us to believe that there might be some pressure along the root of that nerve where it leaves the spinal cord. We know that there is a condition which exists that we refer to as an intervertebral disc, which is due to an abnormality or a destructive condition, with a partial collapse or disintegration of this disc producing herniation. In the herniation, if it is the herniation of the disc—of the disc material into the canal, then to further confirm that diagnosis it would be necessary or it would be advisable to inject some radiographic substance into the spinal canal. At the present time they are using pantopaque, which is injected into the canal, and then, after the solution is injected, x-rays are made and the pantopaque is removed from it, drawn back out of the canal. By comparison with the x-rays, the various x-rays which are taken, and by obstructions above or below the point of condition, or the intervetebral disc, it is possible to determine if there is an actual protrusion of this disc into the canal.

Q. Now, when you speak about "disc", what do you mean when you use the expression "disc" in connection with a man's vertebrae?

A. The disc refers to the tissue between the vertebrae; that is a normal fibrous tissue which absorbs the shock and gives a certain amount of motion. If something develops where that tissue undergoes degeneration, and it begins to bulge into the canal, herniation, or nucleus pulposus is another name, but it means, roughly, intervertebral disc.

Q. Now, you used the expression "herniation". What

did you mean by that in respect to the condition that you were talking about?

A. Herniation means that the tissue has gotten out of its normal position and it is pressing against some other part or organ of the body.

Q. And in this particular case, when you use the word "herniation", you mean that some part of the bony structure or the discs are impinging against some nerve, either in the spinal cord or immediately adjacent thereto?

A. The herniation would refer more to the intervertebral discs and not to any bony structure, because the bony structure, unless there was some destructive process, which apparently there is no sign of, would not be a herniation.

Q. But, nevertheless, the herniation does involve in this case the pressure of the disc on some aspect of the nervous system, or could, as I understand.

A. That is a possibility, with this series of symptoms that the man has.

Q. With the series of symptoms that the man has? All right. Now, assuming, Doctor, that this man was involved in a railroad accident, in February, 1946, where he had a very serious blow to his body in that region of which he made complaint, could this condition that you have described, could that be ascribable to that kind of accident?

MR. JACKSON: You objected to that, Alto.

MR. LEE: In taking this testimony Mr. Jackson and I had an agreement that he would note objections at the point appearing in the testimony, and on the trial of the case we would assign our grounds; and to that point we would assign the ground that it is incompetent, irrelevant and immaterial and based upon a hypothesis which is not founded upon the evidence in this case.

THE COURT: Overrule the objection.

MR. LEE. Except.

THE COURT: Mr. Pettus, is there considerable more of this same deposition?

MR. PETTUS: What's that, your Honor?

MR. JACKSON: Your Honor, we are now on page 10 and the deposition runs through 25.

THE COURT: Gentlemen, I think that deposition is out of all length. You ask him what it is, and ask him what he means by that.

MR. PETTUS: When he speaks about a spondylolisthesis we have got to find out what he means.

THE COURT: Yes, but he answers and then you again ask him what it means.

A. Yes, sir, it could be. The fact of the character and severity of the injury plays no particular part in the development of this disc syndrome that we have been speaking about. The disc syndrome oftentimes results from a very trivial act. I had a patient to develop a disc that was operated on and the operation found the disc, the man reached over to pick up a cake of soap and twisted in doing it. The severity of the transaction does not necessarily—

Q. But it can be caused by a trauma?

A. Oh, yes.

Q. Are you familiar, in its broad outlines, with the kind of work that a railroad brakeman does?

A. Yes, sir.

Q. I think you have testified on a previous occasion that one time in your youth you followed that vocation for a time, didn't you?

A. Yes, sir.

Q. I will ask you to state whether or not, in your professional opinion, Mr. Carter, the man that you examined and about whom you are testifying, is physically able to carry on the vocation of a railroad trainman—brakeman?

A. Brakeman?

MR. JACKSON: Alto, you object to that.

MR. LEE: That objection is noted on the grounds that it is incompetent, irrelevant and immaterial, based on a hypothesis not founded on the evidence in this case, and the witness is not properly qualified to give such an answer.

THE COURT: Overruled.

MR. LEE: Exception.

Q. Yes.

A. No, sir.

Q. Now, one final question. The ordinary x-ray in a matter of this sort shows only the bony displacement, as I understand it. That is correct, isn't it?

A. Yes, sir.

Q. And in order to make this further examination by means of the x-ray that you have described, it is necessary to inject this fluid into the canal, this radiographic substance?

A. Yes. He would have to have some radiographic substance for the purpose of comparison.

Q. Yes.

A. The ordinary x-ray wouldn't show it.

Q. I see. Now, Doctor, are you familiar with Drs. Key and Conwell's Book on Bones?

A. Yes, sir.

Q. Is that a standard work?

A. Yes, sir.

MR. JACKSON: That is all.

MR. JACKSON: Now, the cross examination. You want to read?

MR. LEE: Yes.

CROSS EXAMINATION

On cross examination of the witness Dr. Thuss, Mr. Lee read the questions and Mr. Jackson the answers.

Q. (BY MR. LEE): Dr. Thuss, you spoke of the specialty or your practice as that of an industrial surgeon. To the layman just exactly what do you mean by that, please, sir? State for the benefit of the record there what you mean by the term industrial surgeon.

A. I am the zone surgeon, so-called in some instances, in others the district surgeon for various casualty and insurance companies and also for bus lines, truck lines.

Q. You mean that you specialize—

A. We specialize in the—

Q. In the treatment of employees engaged in industry in different areas or zones in and around Birmingham?

A. Yes, sir.

Q. Is that the way I understand you?

A. Yes, sir.

Q. I believe you testified that you saw Mr. Carter back in March of 1946, around the middle of March?

A. I think that is when it was, yes, sir.

Q. Is that the only occasion during which you saw him, Dr. Thuss?

A. I think so.

Q. Over how long a period of time did you have occasion to see him and observe him during that examination, approximately, in your best judgment?

A. He was in here probably an hour—

Q. An hour?

A. —during which time I may have spent the greater part of that time examining him.

Q. Did you make your x-rays here at your clinic?

A. No, sir.

Q. Where were the x-rays made, Dr. Thuss?

A. They were made at the Jefferson Hospital.

Q. They were made under your direction and supervision, but you didn't see or further examine Mr. Carter after that time?

A. No, sir.

Q. This matter of the injection of this radiographic substance into the spinal canal, was that ever done as far as Mr. Carter was concerned?

A. I don't know.

Q. I mean here by you in Birmingham?

A. No, sir.

Q. Now, Doctor, at that time, in March, was there any evidence of any bruise or body injury that you could determine or observe from just a casual observation of the body—

A. No, sir.

Q. —of his back?

A. No, sir.

Q. In these pictures that you made or had made of Mr. Carter, was there any evidence of any fracture to any of the vertebrae?

A. None that I saw, no, sir.

Q. None that you saw? Doctor, I believe you said that this spondylolisthesis involved the fifth lumbar vertebra and the first sacrum? Is that right?

A. The first sacral segment.

Q. The first sacral segment? Beg your pardon. Now, in the makeup, from a layman's standpoint, of the back there, you have the lumbar spine and then the sacrum is immediately below the lumbar spine? That is correct, is it not?

A. Yes, sir.

Q. Now, there are five vertebrae in the lumbar spine? That is correct?

A. That is normal.

Q. Normal? There is sometimes six, but, as a matter of normality, there are only five?

A. That is right.

Q. Now, I believe in Mr. Carter's x-rays there he had only five lumbar vertebrae?

A. Yes, sir.

Q. Now, Doctor, was there any involvement of the fourth lumbar vertebrae in Mr. Carter's back there, that is with the fourth and fifth?

A. I don't understand what you mean.

Q. In referring to the spondylolisthesis, as you defined it on direct examination, that is the condition you find where you find spondylolisthesis, did you find any such condition with reference to Mr. Carter which would involve the fourth lumbar vertebra and the fifth lumbar vertebra?

A. As I understand it, you mean to ask if there would be a slipping forward of the fourth on the fifth?

Q. The fourth on the fifth or could it have been the fifth on the fourth, the converse? Could that be possible?

A. No; there was apparently no slipping forward. The spondylolisthesis only has reference to the fifth on the sacrum.

Q. The fifth sacrum?

A. The fifth sacrum. If you had a condition where the fourth and fifth were out of line, it would be more referred to as a dislocation or partial dislocation.

Q. And, in your opinion, then if there was any slipping there as to the fourth on the fifth, that would be referred to as a dislocation rather than a spondylolisthesis?

A. Yes, sir.

Q. Now, Doctor, is a spondylolisthesis a congenital deformity?

A. We are not sure; it might be.

Q. As a matter of fact, doesn't the majority of the medical profession now regard a spondylolisthesis as a congenital deformity?

A. No. Two weeks ago I had occasion to be in Atlanta, where there were some several hundred doctors doing that same type of work, and that was one of the things that came up. We had men there from New Orleans, Baltimore,

Boston and New York and this part of the country, and they couldn't agree as to whether it did result from a traumatic condition or whether it resulted from a gradual giving away, or whether in some instances, the man was born with it. I think probably the answer is that, in some instances, all of them would fall into one or more categories.

Q. You wouldn't mean to infer by that that every trauma would possibly result in a spondylolisthesis at that point, though, would you?

A. Fortunately, they do not.

Q. Now, I believe you have already testified, I believe, on cross examination that there was no evidence of any fracture at any point or in any of these x-rays that you made of Mr. Carter's back?

A. No, sir.

Q. I believe you further testified on direct examination to Mr. Jackson that there have been occasions or patients that you have observed where a spondylolisthesis occurred where there was no trauma? Is that correct?

A. Yes, possibly, although it is difficult to get any patient with an absolutely accurate history who doesn't give some history of trauma or injury at sometime or other, so just what part trauma plays in their particular complaint, each case has to be evaluated on its own merits.

Q. But when you examined Mr. Carter, there was no evidence of any sort of trauma, was there?

A. There wasn't any bruising.

Q. That is what I mean. Is that what you term objective?

A. That is what I meant—

Q. Yes, sir.

A. —when you said was there any bruising or contusions.

Q. That is what I have in mind.

A. I saw him some weeks afterwards, and I judge he had sufficient time to get over that, but the external evidence that we were able to see, first, was the man's complaint of the back, stiff, rigid; in walking he walked with a backward rigidity, maintained himself in that protective position.

Q. What I had in mind was external evidence there was as to the spots on his body--

A. There was no external—

Q. —body bruises, or anything like that?

A. No body bruises, no, no cuts and no scars.

Q. You did observe rigidity of his back in the manner in which he held himself, his posture, when he walked?

A. Yes, sir.

Q. And that was an objective symptom, and one of the objective symptoms that you referred to in Mr. Jackson's examination?

A. Yes, sir.

Q. What I had in mind with reference to this spondylolisthesis and trauma was an incident, I believe, of a patient you spoke of having had something involving some soap or something? Was that a spondylolisthesis?

A. That was a combination of spondylolisthesis and intervertebral disc. There was an element of trauma there. The man was in the shower of one of our industrial plants and the soap slipped out of his hand. He reached around to get it, it went back of him, and in reaching around he slipped and reached for it at the same time and immediately felt this pain in his back.

Q. But he slipped in turning but didn't fall as I understand.

A. Well, just as to how much he fell it is rather difficult to say whether he actually fell or not; he never could determine; it was a twisting, possibly.

Q. During your experience, have you ever observed spondylolisthesis where there was no evidence of trauma at all.

A. No. We have had patients which we felt from the x-ray had an exaggerated curve that the x-ray might interpret as being a possible spondylolisthesis, but they were symptom free, and, since they were, we attached no particular significance to it.

Q. Now, in this area there on these x-ray pictures, was there any evidence of any congenital deformity around that area? Will you please examine them, Doctor, and state whether or not that is true?

A. There is an area (indicating) that seems to be an incomplete fusion of the mural arch of the fifth lumbar vertebra.

Q. Will you identify that picture by number, please, sir, so that—

A. I think that (indicating) is the best one; that was the one I was looking upon.

MR. LEE: I will ask the Commissioner to designate that as No. 2.

THE WITNESS: I think that is the best one.

Q. Did you see any evidence in any of the pictures there of arthritis in the lower lumbar spine?

A. No. I don't attach any significance to any arthritic changes. I didn't see enough arthritis to mention it or to be concerned about it. As a matter of fact, the vertebrae are well formed, show no lipping. There are no significant arthritic changes.

Q. Did you see any evidence of any acrocinesia of this fifth transverse process on the ilium?

A. Yes. The transverse processes of the fifth lumbar are wider and do go over to the ilium.

MR. LEE: Is that picture numbered? I don't believe so, Mr. Commissioner. I will ask the Commissioner to number that picture No. 3.

Q. Doctor, would this be considered a recognized statement or definition of a congenital deformity: "It is a condition which a person is either born with or in the situations that are existing at birth which permit later in life the deformity to come to light." Would that be a fair statement or—

A. No, I don't entirely agree with that. I agree with the first part of it. A congenital condition, deformity, is something the person is born with.

Q. Well, could it be a condition existing at birth which permits it to later in life come to light, such as a deformity existing, but conditions existing later on down in life would permit it to come forth?

A. If the condition was there, and they are born with it, it is there all the time.

Q. It is there all the time, but it may not be manifest until a later stage? Could that be correct or come true?

A. Well, if you have a congenital condition that exists at birth, it exists all the time unless it can be surgically corrected, as the case of hare lips or palate, but a congenital condition or a condition that a child is born with—I think what you mean to say is it can be symptom free upon to a certain point.

Q. That is right; and then later symptoms appear?

A. That is possible.

Q. And still be a congenital condition?

A. A congenital condition, yes, sir.

Q. Now, as I understood, you told Mr. Jackson with reference to this herniation, you stated there was a possibility from the symptoms that you observed in reference to Mr. Carter, but you did not state that, in your opinion, there was a herniation, did you?

A. No, sir, I didn't. I think with the evidence at hand, certainly the case would warrant further investigation. This man should have further examination. He should have orthopedic consultation. He should have consultation with a neuro-surgeon, and then, after this consultation, they might deem it advisable to inject this radiographic substance into the spinal cord, with the idea of following the x-rays to the point to see if he does have a ruptured disc with pressure along the nerves' roots. I say that, knowing that some doctors, some very competent neuro-surgeons in this country, operate on such cases as we have here without the injection of the pantopaque solution. I think that the injection of the pantopaque solution does a great deal towards confirming the diagnosis and is helpful.

Q. As I understand you, some neuro-surgeons do operate without going through that process, and still others go through it?

A. Well, Dr. Dandy, and Dr. Dandy was at Johns Hopkins, injected some, some he didn't, and Dr. Mixter, who was at Boston and one of the pioneers in this work, had the same work. Now, Dr. Caldwell and Dr. Echols, in New Orleans, made the statement that they inject most of theirs, for the purpose of diagnosis.

Q. In other words, it is more or less a difference of opinion among the medical profession as to whether or not that is helpful?

A. I think it is a matter of individuality as to whether the doctor is sure of his own diagnosis. Some of them operate with the idea that the disc, the disc syndrome would demand a surgical investigation.

Q. Then, as I understand your testimony, this last portion of it that is, some neuro-surgeons operate either before or after the injection of this radiographic substance, which you state is a matter of individuality to satisfy themselves with reference to their own diagnosis? Is that correct?

A. Yes. I think the injection is largely left up to the combination of surgeons and neuro-surgeons who are considering that individual case.

Q. Are operations for these conditions successful, Dr. Thuss?

A. I recently saw a survey of the results of a survey over a six-year period on approximately two hundred highly selected cases that were reviewed by one insurance company. I say selected, because, obviously, they had had thousands of back cases, but these cases were operated on by competent men over the country. They classified their results, and these figures are approximate but fairly close: Of these two hundred highly selected cases by this one particular company, over a six-year period—now, these cases were not reviewed to see whether these patients should or should not have been operated or whether they were well

operated or not well operated; all they said, here are two hundred cases that were paid on. The men were disabled so long, and the cost to us was so much; there was no question as to whether the operation was necessary or not necessary.

Q. But they were all operated on?

THE COURT: A good deal of this is not response to the questions asked, and a great, long dissertation by the doctor to show how learned he is.

MR. PETTUS: Will your Honor permit us to read that?

THE COURT: How is that?

MR. PETTUS: Will your Honor permit us to read that?

THE COURT: I reckon there is no other way. I don't know of any other. If I had that doctor here and being examined before me.

MR. PETTUS: Your Honor, it is material for this reason.

THE COURT: I know some of it is material.

MR. PETTUS: If the condition be curable by operation, of course, it would be vital; but this shows the operation is highly speculative and unsatisfactory in results.

MR. LEE: We object.

THE COURT: Well, some of it is highly speculative and don't know whether they would or not. Go ahead.

A. They were operated on by very competent men throughout the country. Of these two hundred—

THE COURT: He could have answered that question in four words; then he goes on making a great, long speech.

A. (continuing) . . . Of these two hundred cases they classified them as to good results and poor results. The good results were cases that got well in approximately a year. The poor results were cases that didn't get well in a year, or some of them apparently never did get well. The sum total was that approximately from sixty to sixty-six per cent were classified as good. The other forty per cent were classified as poor results.

Q. Could you give any break-down as to that thirty-four to forty per cent, as to the ones who did recover over a period of longer than a year?

A. They didn't recover at all, apparently. They were followed as far as they could be followed, and they were still having trouble. Now, those were the forty per cent, approximately forty per cent. Now, those results were quite optimistic in comparison to statistics which were gotten up by another company. Now, these statistics were published at considerable length in The American Journal of Surgery, but I do not recall the statistics, with the break-down on those cases. These were the most optimistic statistics that I have seen.

Q. And you haven't come in contact with any that did give a successful result in as much as eighty-five per cent of the cases in which they were operated on?

A. I believe if anybody said that they were getting eighty-five per cent results in their disc operations, we would just send them all of them. I do not believe anybody is getting any eighty-five per cent. This I do know, the Army operated on them for a while and they discontinued it.

Q. Doctor, at whose instance was this examination made of Mr. Carter?

A. At the request of Mr. Jackson.

Q. What were the charges therefor and by whom were you paid?

A. $50.00 for the x-rays and examination, and paid by Mr. Jackson.

MR. LEE: That is all.

REDIRECT EXAMINATION

Mr. Pettus read the questions and Mr. Jackson the answers.

MR. JACKSON: Just one more question.

Q. (BY MR. JACKSON): Going back to this two hundred that were operated on by this large insurance company, I think you testified that they were screened cases.

A. Highly screened cases.

Q. Highly screened cases? You mean by that, they were cases which the doctors who were making the examinations and doing the cutting, they thought that they had the best chance of successful outcomes of the operations in those two hundred cases? Is that right?

MR. JACKSON: Alto, you object to that.

MR. LEE: The objection is noted on the grounds of incompetency, irrelevant, illegal and immaterial, and not germane to anything in this cause.

THE COURT: Overruled.

MR. LEE: Exception.

Q. Well, just state what you mean by that?

A. Well, I think they were highly selected cases. I think they were cases where they had been thoroughly studied. I think they were cases where the doctors had gone over them carefully and undoubtedly were cases that the insurance companies had been consulted and their approval as to the operative procedure had been carried out. By "screened" they were selected and worked up; some of them had been discarded as being inoperative; some of them had refused the operation, and some of them had drifted elsewhere, but they were selected cases out of a large group.

THE COURT: I think the answer to that is probably objectionable, because he doesn't undertake to say that he has knowledge about that; only what he thinks about it.

MR. LEE: Objection was noted to the question on that basis.

MR. JACKSON: There was no objection to the question just answered.

MR. LEE: Well, objection to the previous question, "state what you mean about that".

Q. And they were also cases, I understand, that had the best chance to win in, too, weren't they?

A. I think so; I think so.

MR. JACKSON: That is all I want to ask him.

RECROSS EXAMINATION

MR. PETTUS: Re-cross by Mr. Lee.

Mr. Lee read the questions and Mr. Jackson the answers.

Q. (BY MR. LEE): That is based on statistical information that you received from that report, that testimony that you gave to Mr. Jackson.

A. This information was obtained from the Medical Director, along with their staff, of one of our large national insurance companies, and they were giving us, their doctors, this information because we come in contact with these cases.

Q. When you saw Mr. Carter, was he walking on his own volition or under his own power, or was he being carried at the time that you saw him? Was he mobile or immobile?

A. Well, he was ambulatory; he was walking.

Q. I believe I used the wrong word. What size man was he, Doctor?

A. He was a little over six feet and weighed a couple of hundred pounds, about two hundred or two hundred and twenty pounds.

Q. Between two hundred and two hundred and twenty when you saw him?

A. Yes, sir.

MR. LEE: All right.

MR. JACKSON: That's all of the examination for the doctor, Judge. Next man is named Kirkpatrick.

Mr. Pettus read the questions and Mr. Jackson the answers on direct examination.

DEPOSITION OF JAMES L. KIRKPATRICK

Witness for the Plaintiff
Direct Examination

Q. (BY MR. JACKSON): Will you please state your name and place of residence?

A. James L. Kirkpatrick, 13 Montevallo Lane, Mountain Brook, Alabama.

Q. In what vocation or profession are you engaged, Mr. Kirkpatrick?

A. That of actuary of the Protective Life Insurance Company.

Q. How long have you been in that profession or vocation?

A. Well, I have been in this capacity—in that capacity with this company since 1939. Prior to that time, for approximately seven years, with the Equitable Life of Iowa, at Des Moines.

Q. You have been an actuary then for approximately fifteen years?

A. Yes. I have been doing actuarial work since—well, I started it in the Summer of 1931, and made it a full-time career since 1932.

Q. And I believe that you are Chief Actuary for the Protective Life Insurance Company.

A. That is correct.

Q. You are familiar with mortality tables, are you not?

A. I am.

Q. That is a part of your job as an actuary, as I understand?

A. Yes, that is right.

Q. Could you just briefly state for the record what purpose the mortality tables serve in your business?

MR. LEE: We object to that as incompetent, irrelevant, illegal and immaterial, and not germane to the issues in this case.

THE COURT: Read the record.

MR. PETTUS: Could you just briefly state for the record what purpose the mortality tables serve in your business?

MR. LEE: That was for the purpose of life insurance business.

THE COURT: Overruled.

MR. LEE: Save the exception.

A. A mortality table shows the number of persons living at various ages, the number of people who are expected to die between one age and the next, and it shows other information, such as the probability of life and death, and some tables show the expectation of life. The main use of mortality tables in a life insurance company is as a basis of premium rate and policy reserve calculations.

Q. On the basis of these tables you can tell what a man's life expectancy is, assuming he is in good health, can't you?

MR. LEE: We note an objection on the same grounds: incompetent, irrelevant, illegal and immaterial, and not germane.

THE COURT: Overrule.

MR. LEE: Save the exception.

A. The table, of course, shows the expectation of life, and with regard to good health, in preparing the tables, all those who have had an examination within five years has been excluded in many tables, so that we have what we call an ultimate table; in other words, the ultimate mortality table is designed to reflect the mortality to be expected from the figures—

Q. If a man were born on April 17, 1912, which is the date of the birth of the plaintiff in this case, how old would he be on December 2, 1947, the date of the trial of this case? I think I figured that out—

A. Yes, I have. Thirty-five years and two hundred and twenty-nine days.

Q. Two hundred and twenty-nine days?

A. That is correct.

Q. What would be his expectancy, Doctor, based on these tables that we were just talking about?

MR. LEE: We object. Incompetent, irrelevant and immaterial, not germane to the issue.

THE COURT: To be competent it would have to be shown he was in normal health.

MR. JACKSON: No, sir. They have stated these tables are applicable to anybody.

MR. LEE: As long as they were in good health.

MR. JACKSON: No. He rejects that in his answer.

THE COURT: Well, overrule.

MR. LEE: Save the exception.

A. In order to answer that question, I might state that there are—I mean there is more than one mortality table in existence that has been used as a basis for computing insurance premiums and for computing rates of expectation—I mean computing expectation of life, and in order to answer your question, I would have to know what table.

Q. Well, on the basis of the table commonly used by insurance companies, what would be his expectancy?

MR. LEE: We object. It is incompetent, irrelevant and immaterial and not germane to the issue.

THE COURT: Overrule.

MR. LEE: Save the exception.

Q. On the basis of the table which you would use here in the performance of your duties?

MR. LEE: Same objection. Same grounds.

THE COURT: Overrule.

MR. LEE: Except.

A. Well, I will have to answer that in this respect. At the present time our reserves are based on the American Experience Table. However, we have just recently completed figures which will become effective on or around January 1, 1948, on the basis of the new 1941 Commercial Standard Ordinary Mortality Table.

Q. On the basis of your tables that are currently in use

in the country, as I understand it, or will be shortly in all insurance companies—

A. Some companies have already made the change, and, in many states, it is going to be required after January 1, 1948.

Q. By the matter of statute?

A. That is right.

Q. On the basis of those tables, what would be the expectancy of a man thirty-five years old, seven month and fifteen days—

MR. LEE: We object. Incompetent, irrelevant, immaterial, and not germane to the issues of this case, and not predicated on the man being in good health at the time that was made.

THE COURT: Overrule.

MR. LEE: Except.

A. In order to arrive at that, I have used an interpolation. The expectation of life at age thirty-five, according to the 1941 Commercial Standard Ordinary Table, is 33.44. At age thirty-six, it is shown in the table as 32.59. When one interpolates between those two expectations for the two hundred and twenty-nine days which have elapsed since age thirty-five, the expectation turns out to be 32.91.

Q. 32.91 years?

A. That is right.

Q. Now, Mr. Kirkpatrick, at the interest rate of 5 per cent, compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy of a man 32.91 years?

MR. LEE: We object as incompetent, irrelevant, illegal and immaterial, and not germane to the issue in this case.

THE COURT: Sustain the objection on that.

MR. JACKSON: Could you hear us, your Honor, on the law on that?

THE COURT: Well, after we get through I will hear you on that.

A. (BY THE WITNESS): Will you please restate the rate of interest?

Q. Five per cent?

MR. LEE: Of course, he went ahead and had sustained the objection on that question. That would eliminate that second one.

MR. JACKSON: Was the objection first by your Honor sustained, and his request to restate the question?

THE COURT: Yes.

MR. LEE: That would be the same question, and the same ruling required there.

MR. PETTUS: We except.

Q. Now, Mr. Kirkpatrick, I will ask you the same question at the interest rate of five and one-half per cent?

MR. LEE: We object to that: incompetent, irrelevant, illegal, and not material to the issue in this case.

THE COURT: Sustained.

MR. PETTUS: We except.

Q. Mr. Kirkpatrick, at the interest rate of six per cent compounded, what sum of money would be presently required to produce an income of $100.00 per month for and during the life expectancy, the life expectancy of 32.91 years?

MR. LEE: We object. Incompetent, irrelevant and immaterial; not germane to the issues in this case.

THE COURT: Sustain.

MR. PETTUS: We except.

Q. Are you familiar with the income earned by the money of this company now out on investment?

MR. LEE: We object. Incompetent, irrelevant, immaterial.

THE COURT: Sustain the objection.

MR. PETTUS: We except.

Q. What is the rate of interest that you are now earning on money of that sort, what do you average?

MR. LEE: We object. Incompetent, irrelevant and immaterial.

THE COURT: Sustain the objection.

MR. JACKSON: We except.

Q. Is there any substantial variation this year from what is was last year?

MR. LEE: If the Court please, that is a continuation of the same question on the same line to which that objection was noted.

MR. JACKSON: Mr. Lee and I specifically agreed he would reserve an objection to each question.

MR. LEE: That's right.

MR. JACKSON: And no such reservation to this question—

MR. LEE: I know, Kirk; but the same line.

THE COURT: I will let that stand, in the light of the ruling already made.

MR. PETTUS: We except.

Q. Now, can you tell us what Government securities will pay, what percentage an investment in Government securities will be if the investment were made as of approximately now, what can you get on government issues—

MR. LEE: We noted an objection to that. It is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

MR. PETTUS: We except.

Q. Now, what rate of return could be safely obtained on first-class listed securities other than Government issues, in your judgment, now, Mr. Kirkpatrick?

MR. LEE: We object. Incompetent, irrelevant and immaterial.

THE COURT: Sustained.

MR. PETTUS: We except.

MR. JACKSON: All right, I won't press you any further. I don't want to ask him anything further.

CROSS EXAMINATION

Q. (BY MR. LEE): You are not familiar with the matters involved in this litigation, are you, Mr. Kirkpatrick, that is, either of the parties, the earning capacity, or anything of that nature, are you?

A. That is correct. I know none of those facts.

MR. LEE: That is all.

MR. JACKSON: We offer the depositions in evidence.

MR. LEE: With the offer of them, we renew the same objections as are noted in the course of the reading, the reading of the questions and answers. I mean as a matter of record.

MR. JACKSON: I am not trying to get the testimony in evidence that your Honor ruled out. Just merely want to go through the offering of the depositions in the routine manner.

MR. LEE: Oh, no.

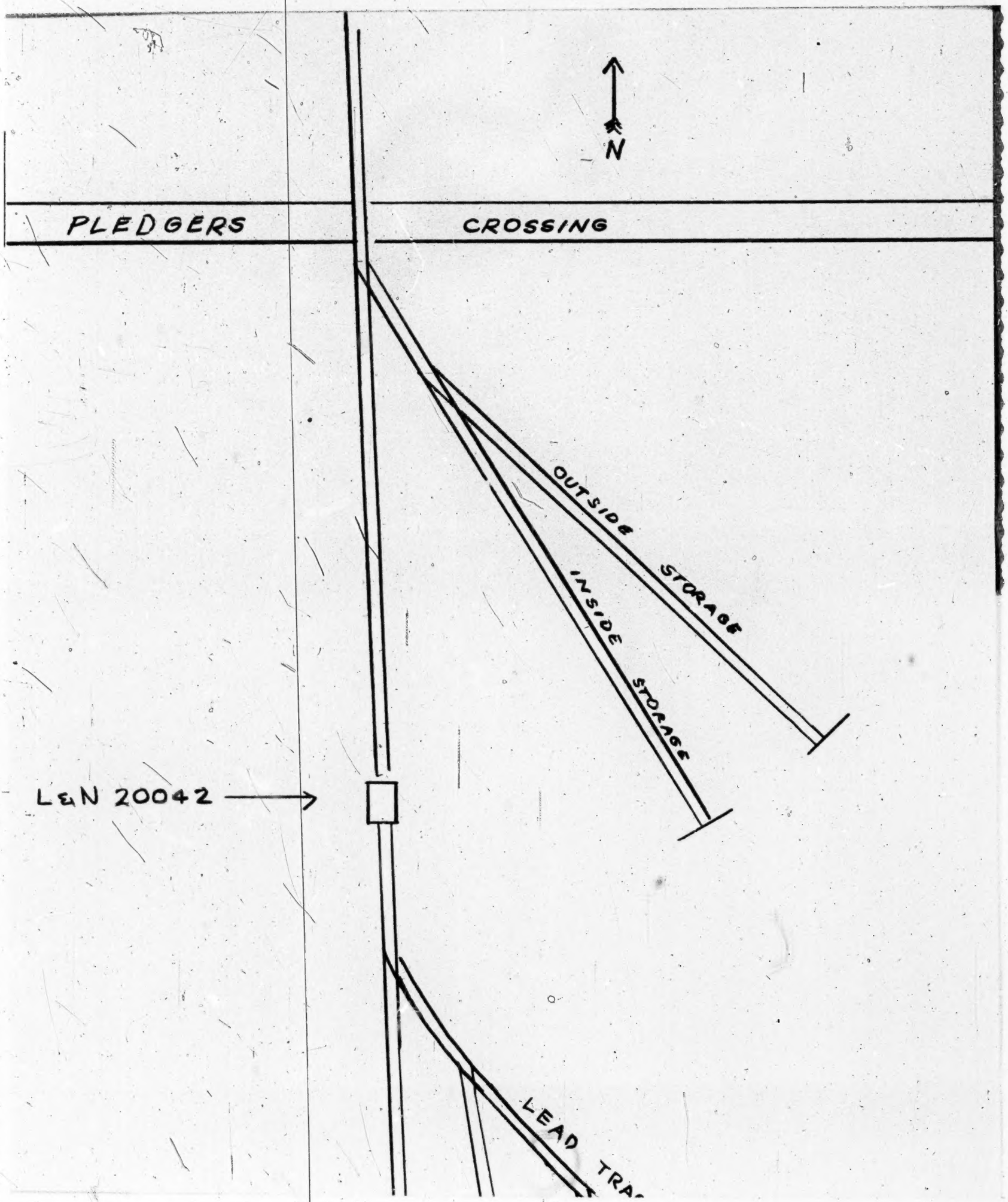
The depositions are marked Plaintiff's Exhibit 2.

MR. PETTUS: By that statement we don't waive our exception as to your Honor's ruling as to your view.

THE COURT: No.

* * * *

Then comes the testimony of MRS. NEROY CARTER, which commences on page 88 of the Record.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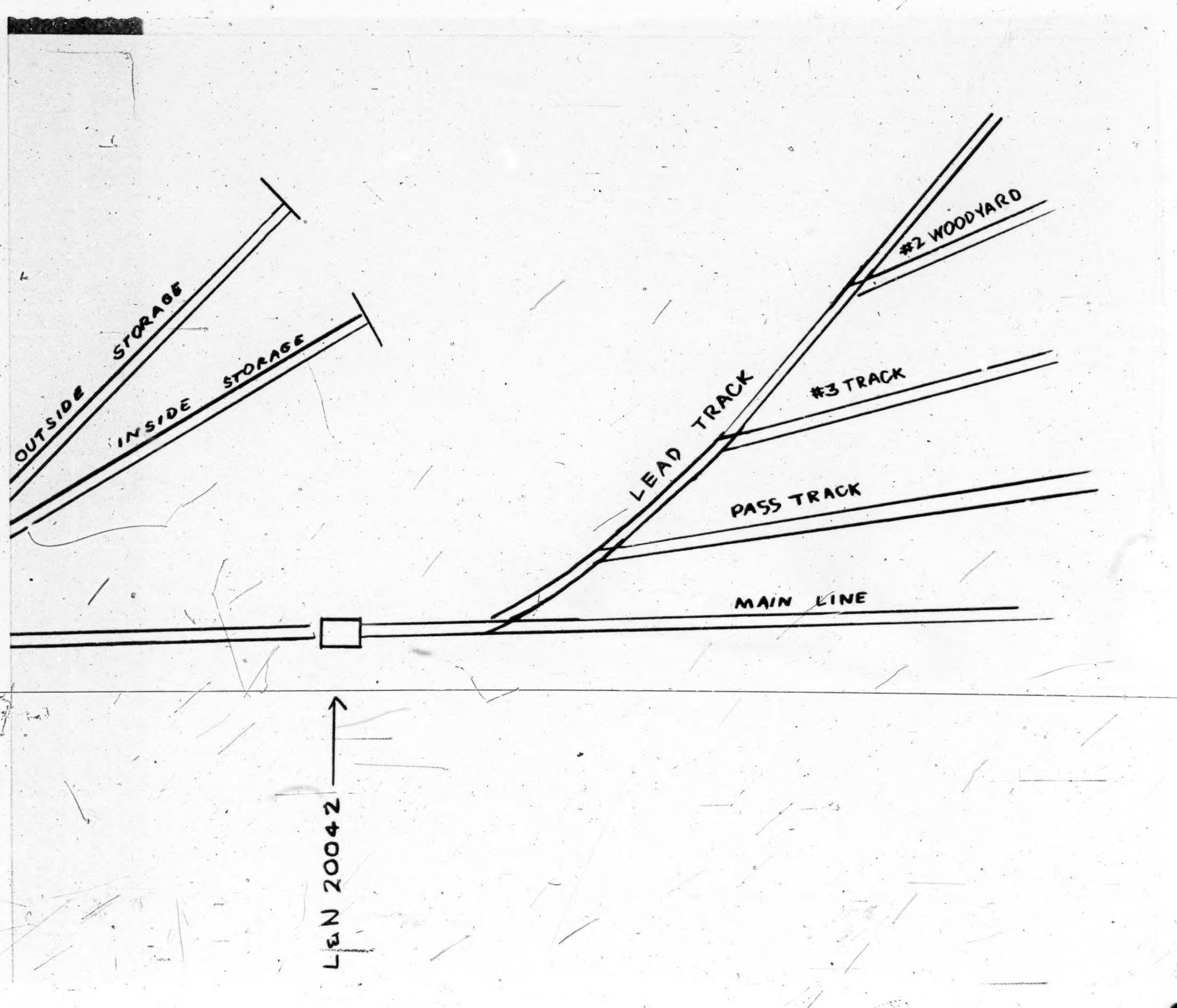
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